APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

EQUAL RIGHTS CENTER, a not for profit corporation; AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, a not for profit corporation; UNITED SPINAL ASSOCIATION, a not for profit corporation,

Plaintiffs,

and

ARCHSTONE MULTIFAMILY SERIES I TRUST; ARCHSTONE,

Defendants-Appellants,

v.

NILES BOLTON ASSOCIATES, a Georgia Corporation,

Defendant-Appellee,

and

CLARK REALTY BUILDERS, LLC, a Maryland Corporation; VIKA INCORPORATED, a Maryland Corporation; MEEKS PARTNERS, f/k/a Kaufman Meeks and Partners, a Texas partnership; NATIONAL MULTI HOUSING COUNCIL,

Defendants.

No. 09-1453

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Andre M. Davis, District Judge.
(1:04-cv-03975-AMD)

Argued: January 27, 2010
Decided: April 19, 2010

Before NIEMEYER, KING, and SHEDD,
Circuit Judges.

Affirmed by published opinion. Judge Shedd wrote the opinion, in which Judge Niemeyer and Judge King joined.

SHEDD, Circuit Judge:

Archstone Multifamily Series I Trust and Archstone (collectively referred to as "Archstone") appeal an order of the district court granting summary judgment in favor of Niles Bolton Associates, Inc. ("Niles Bolton"). Archstone also appeals the district court's denial of its motion to amend its complaint to include a claim for contribution. In granting summary judgment, the court concluded that Archstone's state-law claims are preempted by the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101*et seq.*; in denying the motion to amend, the court concluded that allowing Archstone to amend its complaint would be prejudicial to Niles Bolton and, in any event, futile. For the following reasons, we affirm.

I.

Archstone develops and owns multi-family housing projects throughout the United States. Archstone hired Niles Bolton as its architect to design a number of multi-family apartment buildings on the East Coast in the 1990s. In 2004, the Equal Rights Center and several other disability advocacy groups ("Equal Rights plaintiffs") filed this lawsuit against Archstone, Niles Bolton, various contractors, and other architects used by Archstone, alleging that these entities failed to design and construct 71 apartment buildings so that they would be accessible to persons with disabilities in compliance with the FHA and ADA.

Archstone and the Equal Rights plaintiffs entered into a Consent Decree to settle the lawsuit covering the 71 apartment communities, 15 of which were designed by Niles Bolton. Under the settlement, Archstone was required, *inter alia*, to retrofit the 71 properties to make them compliant with the FHA and ADA and pay the plaintiffs $1.4 million to cover damages, attorneys' fees, and expenses. Archstone has retrofitted a majority of the 71 properties and is in the process of retrofitting the remainder. According to Archstone, the costs of the retrofits at the sites designed by Niles Bolton exceed $2.5 million. Niles Bolton was not a party to the settlement between Archstone and the Equal Rights plaintiffs. However, Niles Bolton later entered into a separate Consent Decree with the Equal Rights plaintiffs that did not include any admission of liability.

Following settlement with the Equal Rights plaintiffs, Archstone filed a cross-claim against Niles Bolton asserting four state-law causes of action: (1) express indemnity; (2) implied indemnity;

(3) breach of contract; and (4) professional negligence. The express indemnity claim focuses on clauses in the contracts between Niles Bolton and Archstone in which Niles Bolton promised to "make good any defects in its services resulting from the failure of the Architect or any of its Consultants to perform their respective services in a manner that is commensurate with the professional standard of care" and to "indemnify" Archstone "from and against all losses, claims, liabilities, injuries, damages and expenses, including attorneys' fees and litigation costs . . . arising out of or resulting from or in connection with, the performance, or failure to perform, by the Architect or its employees." J.A. 37, 51-52. Niles Bolton and Archstone also agreed that "designs or specifications furnished by the Architect found to be negligent will be promptly corrected by the Architect at no cost to the Owner, and the Architect will be responsible to the Owner for all damages, if any, resulting from such defective designs or specifications." J.A. 148. They further agreed that "[a]ny designs or specifications furnished by the Architect which contain errors in coordination of details or dimensional errors will be promptly corrected by the Architect at no cost to the Owner". *Id.*

Archstone's implied indemnity claim rests on the principle that Niles Bolton "bears a substantially greater share of responsibility for any failure of the Properties to be designed according to the requirements of the FHA and the ADA, given Niles Bolton's superior knowledge, skill and involvement in the design of the properties." J.A. 369. The breach of contract claim, as alleged by Archstone, arises because Niles Bolton breached the warranties under its contracts with Archstone by failing to design properties that are in compliance with the FHA and ADA. Fi-

nally, Archstone's professional negligence claim results from Niles Bolton's alleged "failure to exercise the level of professional skill and care required of an architect" to design the properties in question in a manner that conforms to the requirements of the FHA and ADA. J.A. 370. For these state-law causes of action, Archstone sought (1) to recover damages, attorney's fees and costs paid by Archstone to the Equal Rights plaintiffs, (2) to recover costs it incurred retrofitting those portions of the Properties improperly designed by Niles Bolton, and (3) to be indemnified for costs that Archstone will incur to modify the remainder of the properties designed by Niles Bolton that have yet to be retrofitted.

After Archstone filed its cross-claim, the parties conducted discovery for approximately three years. During the course of discovery, Niles Bolton sought to compel Archstone to disclose evidence regarding Archstone's allocation of damages among itself, Niles Bolton, and any other party. Archstone resisted these discovery requests by arguing that it was seeking damages for the 15 of 71 properties that Niles Bolton designed and *all* related settlement amounts, attorneys' fees, and costs paid to the Equal Rights plaintiffs, as well as the costs of retrofitting the 15 properties designed by Niles Bolton. The district court affirmed the magistrate judge's grant of a protective order to Archstone because the allocation of damages was irrelevant to a claim for indemnity. The district court further noted that "there is no suggestion in [the magistrate's discovery rulings] that the court perceived there to be a contribution claim presented by Archstone." *Equal Rights Center v. Archstone Smith Trust, et al.*, 603 F. Supp. 2d 814, 819 (D. Md. 2009).

Three weeks after the close of discovery and on the eve of the deadline for dispositive motions, Archstone filed a motion for leave to amend its cross-claim to include a claim for contribution. Under the amended complaint, Archstone sought to recover contribution on the same grounds as its original claims. In a memorandum order, the district court denied the motion for leave to amend on the ground that it would result in prejudice to Niles Bolton. According to the court, because a claim for contribution requires an analysis of the relative fault of the parties while a claim for indemnification does not, amending the complaint to add this claim would require additional discovery of the type previously rejected by the court because of its view that Archstone was seeking only indemnification rather than contribution. Because Archstone did not move for leave to amend the complaint until after three years of discovery and on the eve of dispositive motions, the court held that the amendment would prejudice Niles Bolton. Further, the court held that even if there were no prejudice, a state-law claim for contribution would be futile because it would be preempted under federal law.

The district court also granted summary judgment in favor of Niles Bolton. The court reasoned that although styled as state-law claims for relief, Archstone's causes of action were indemnity and *de facto* indemnity claims for violations of the FHA and ADA. Because no right to indemnification exists under these laws, and because allowing indemnification on the state-law claims asserted by Archstone would be antithetical to the purposes of the FHA and ADA, the court held that federal law preempted these claims under the doctrine of conflict, or obstacle, preemption.

Archstone timely appealed the grant of summary judgment and the denial of its motion for leave to amend. We address each issue in turn.

II.

A.

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We review the district court's order granting summary judgment *de novo*. *Jennings v. U.N.C.*, 482 F.3d 686, 694 (4th Cir. 2007) (en banc). Likewise, we also review the district court's preemption determination *de novo*. *AES Sparrow Point LNG, LLC v. Smith*, 527 F.3d 120, 125 (4th Cir. 2008).

Archstone argues that the district court erred because its state-law claims are not antithetical to Congress' purpose in enacting the FHA and ADA. Archstone claims that no conflict or obstacle exists because its cross-claim does not impose requirements that make compliance with federal law impossible. Further, it claims that it only seeks partial indemnity because it seeks to recover only the damages caused by Niles Bolton. Archstone also contends that the court erred in finding its breach of contract and negligence claims are preempted as *de facto* claims for indemnification. Archstone asserts that its claims are not derivative because it is not attempting to enforce the duties that Niles Bolton owed to the Equal Rights plaintiffs, but rather is seeking to enforce the duties Niles Bolton owed to Archstone. Having conducted a *de novo* review of the record, we hold the

district court did not err in finding these claims preempted.

B.

Obstacle preemption applies "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The Supreme Court has found state-law claims preempted under obstacle preemption where a state-law claim "interferes with the methods by which the federal statute was designed to reach [its] goal." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992) (internal quotation marks and citation omitted). We have explained that

> [a] decision about [obstacle preemption] requires the court independently to consider national interests and their putative conflict with state interests. . . . [P]reemption under [an obstacle preemption] theory is more an exercise of policy choices by a court than strict statutory construction.

Abbot v. Am. Cyanamid Co., 844 F.2d 1108, 1113 (4th Cir. 1988). Obstacle preemption can apply not only to positive enactments of state law but also to state tort claims. *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (holding that negligence action against a manufacturer was preempted because it conflicted with a federal agency standard).

In finding Archstone's state-law claims preempted, the district court correctly used the guidance we set forth in *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989) (en banc). In *Baker, Watts & Co.*, we considered whether the

Securities Exchange Act of 1933 preempted a state-law claim for indemnity. In holding the indemnification claim is preempted, we analyzed whether the claim represented an obstacle to the regulatory goals of the federal law. We explained that "Congress ha[d] not provided a right to indemnification in the federal securities laws under any circumstances." *Id.* at 1108. Furthermore, we emphasized the total nature of a claim for indemnity, concluding that "it would run counter to the basic policy of the federal securities laws to allow a securities wrongdoer . . . to shift its *entire* responsibility for federal violations on the basis of a collateral state action for indemnification." *Id.* (emphasis added). As we explained, "[t]he goal of the 1933 and 1934 Acts is preventive as well as remedial, and 'denying indemnification encourages the reasonable care required by the federal securities provisions.' " *Id.* (internal citations omitted).

We believe this reasoning applies with equal force to an indemnity claim brought under the FHA and ADA. To begin, as with the securities laws at issue in *Baker, Watts & Co.*, the goals of the FHA and ADA are "regulatory rather than compensatory." The principal purpose of the ADA is to "(1) . . . provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities [and] (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b). The primary purpose of the FHA is "to provide . . . for fair housing throughout the United States." 42 U.S.C. § 3601. Furthermore, compliance with the ADA and FHA, as conceded by Archstone, is "nondelegable" in that an owner cannot "insulate himself from liability for . . . discrimination in regard to living premises owned by him and ma-

naged for his benefit merely by relinquishing the responsibility for preventing such discrimination to another party." *See Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir. 1992). Under these principles, it is clear that, like the securities laws at issue in *Baker, Watts & Co.*, the regulatory purposes of the FHA and ADA would be undermined by allowing a claim for indemnity.

Here, Archstone sought to allocate the full risk of loss to Niles Bolton for the apartment buildings at issue. Allowing an owner to completely insulate itself from liability for an ADA or FHA violation through contract diminishes its incentive to ensure compliance with discrimination laws. If a developer of apartment housing, who concededly has a nondelegable duty to comply with the ADA and FHA, can be indemnified under state law for its ADA and FHA violations, then the developer will not be accountable for discriminatory practices in building apartment housing. Such a result is antithetical to the purposes of the FHA and ADA. Accordingly, we find Archstone's indemnification claims are preempted.[1]

We also hold that the district court correctly held Archstone's state-law breach of contract and negligence claims to be *de facto* indemnification claims

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[1] Archstone argues that because 28 C.F.R. § 36.201(b) permits "allocation of responsibility for complying with the obligations" of the ADA, indemnity is not preempted. We find this argument unpersuasive. The history of this regulation demonstrates that this allocation provision is unique to the landlord-tenant relationship and does not impact the relationships between architects, builders, and other parties. *See* Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35544, 35555-56 (July 26, 1991).

and, thus, preempted. Our conclusion is buttressed by Archstone's argument in its brief, and repeated at oral argument, that it seeks—regardless of how it labels its claim—to recover 100% of the losses at the 15 sites where Niles Bolton provided architectural services. Such a claim for relief is a *de facto* claim for indemnification derived from violations of these federal statutes. Although Archstone suggests that these claims are not derivative because it only seeks to enforce duties Niles Bolton owes to Archstone, we find that this argument fails because Archstone really seeks to have Niles Bolton pay *all* damages that arise under the FHA and ADA at these sites.

Therefore, we agree with the district court that these *de facto* indemnification state-law claims by Archstone are pre-empted under federal law. *See Baker, Watts & Co.*, 876 F.2d at 1108 (holding that plaintiff's pendent common law actions are pre-empted to the extent that they are *de facto* claims for indemnification). Accordingly, we affirm the district court's grant of summary judgment in favor of Niles Bolton.

III.

We must next decide whether the district court erred by denying Archstone leave to amend its complaint to include a claim for contribution. We review the district court's denial of a motion to amend a complaint under the deferential abuse of discretion standard. *See Glaser v. Enzo Biochem, Inc.*, 464 F.3d 474, 476 (4th Cir. 2006). Although leave to amend should be "freely give[n] when justice so requires," Fed. R. Civ. P. 15(a)(2), a district court has discretion to deny a motion to amend a complaint, so long as it does not outright refuse "to grant the leave without any justifying reason." *Foman v. Davis*, 371

U.S. 178, 182 (1962). A district court may deny a motion to amend when the amendment would be prejudicial to the opposing party, the moving party has acted in bad faith, or the amendment would be futile. *See Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (en banc). Here, the district court gave two bases for denying Archstone's motion to amend—prejudice and futility. Because we believe the district court did not abuse its discretion on at least one of these bases, we affirm.

As to the first basis—prejudice—the district court held that the addition of a contribution claim after the close of a three-year long discovery process and on the eve of the deadline for dispositive motions would have required it to reopen discovery and thereby prejudice Niles Bolton. *See Equal Rights Center*, 603 F. Supp. 2d at 820. In finding that the addition of a claim for contribution would change the character of litigation, the court stated:

> Niles Bolton correctly infers from the proposed claim for contribution that Archstone is essentially admitting liability for some of the violations at the Niles Bolton-designed properties Archstone developed and operates. This admission, according to Niles Bolton, would require further discovery into the nature of each and every alleged violation (under myriad states' laws) to which Archstone is impliedly conceding liability.
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> In other words, as the case had been framed in the more than three years before the motion to amend was filed, Niles Bolton was alleged, by virtue of the claim for indemnification, to be solely liable under the FHA and the ADA for all of the violations in the com-

plexes it designed. . . . To permit an eleventh hour change in litigation theory to one of partial liability would mean that Niles Bolton has been prejudiced in its ability to assess rationally its exposure to a damages award in favor of Archstone, as its litigation plan did not contemplate such an atomistic battlefield. Furthermore, Niles Bolton's settlement posture would of necessity have been quite different three years ago (before the expenditure of large sums for attorney's fees and litigation expenses) had it known that it was not facing a liability in excess of 15/71 of $1.5 million plus some share of the cost of retrofitting, but something considerably below that amount. . . .

Unquestionably, any reasonable litigant in Niles Bolton's position would have sought specific discovery into how Archstone believed it appropriate to allocate fault for the violations alleged by Plaintiffs, *e.g.*, was Niles Bolton 25% at fault; 35%; 75%? Plainly, in the face of a claim solely for indemnification, no litigant would have been motivated to undertake such discovery, and Niles Bolton has not done so.

Indeed, Niles Bolton attempted in some ways to obtain certain discovery that, indisputably, would have been relevant to a contribution claim but not to an indemnity claim. Archstone resisted such discovery and both Magistrate Judge Gesner (who managed discovery) and I sustained Archstone's objections, each of us on the understanding that Archstone was pursuing *indemnity*.

Id. at 818-819 (emphasis in original).

We hold that the district court did not abuse its discretion in finding the proposed amendment would be unduly prejudicial to Niles Bolton. We find compelling the court's analysis that the amendment—coming so belatedly—would change the nature of the litigation and, would therefore, prejudice Niles Bolton.[2] *See Deasy v. Hill*, 833 F.2d 38, 42 (4th Cir. 1987) (noting that "[b]elated claims which change the character of litigation are not favored").[3]

Archstone argues on appeal that its proposed amendment would not prejudice Niles Bolton because it would not change the character of the litigation. Specifically, Archstone argues that it seeks the same relief that it has sought throughout the litigation and no further discovery would be needed—hence, no prejudice would result for Niles Bolton. *See, e.g.*, Appellant's Br. 50 (arguing that it "seeks the same relief under both its indemnity and

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[2] We need not reach the district court's futility analysis because we find the district court's prejudice analysis is a sufficient basis to affirm the denial of the motion to amend. Accordingly, we do not reach the question of whether a state-law claim for contribution is preempted under federal law.

[3] We have repeatedly affirmed denials of motions to amend which change the character of the litigation late in the proceedings. *See Smith v. Angelone*, 111 F.3d 1126, 1135 (4th Cir. 1997) (holding that given the delay in amending, the late hour of the motion to amend, and the burdens it would impose on the opposing party, the district court did not abuse its discretion in denying the motion to amend); *see also Deasy*, 833 F.2d at 40 (affirming the district court's discretion to deny the motion to amend because of the undue delay and prejudice caused to the opposing party); *Barnes Group, Inc. v. C & C Products, Inc.*, 716 F.2d 1023, 1035 n. 35 (4th Cir. 1983) (affirming the district court's denial of defendant's motion to amend).

contribution theories"). Indeed, at oral argument, Archstone conceded that its contribution claim would seek to have Niles Bolton cover 100% of the damages at the 15 properties in question. Archstone's position demonstrates a fundamental misunderstanding of the difference between contribution and indemnification. *See Baker, Watts & Co.*, 876 F.2d at 1103 (noting that "[i]ndemnification, of course, involves shifting the entire loss from one wrongdoer to another; contribution requires each wrongdoer to pay his proportionate—or *pro rata*—share of the adverse judgment"). As presented on appeal, the claim which Archstone presents in its amended complaint is a *de facto* indemnification claim, and such a claim is preempted under federal law. Therefore, allowing Archstone to amend under these circumstances to include a so-called contribution claim is, in any event, futile. Accordingly, we affirm the district court's denial of the motion to amend.[4]

IV.

For the foregoing reasons, we affirm both the district court's grant of summary judgment in favor of Niles Bolton and its denial of Archstone's motion to amend its complaint.

AFFIRMED

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[4] At oral argument, there was discussion concerning whether the district court abused its discretion in denying this amendment because the original complaint included the word "contribution" in one of the counts. However, any such argument has been waived because it was not raised in Archstone's opening brief. *See United States v. Jones*, 308 F.3d 425, 427 n.1 (4th Cir. 2002) (holding that an argument not raised in the opening brief is waived).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

EQUAL RIGHTS CENTER, et al.,

Plaintiffs

v.

ARCHSTONE SMITH TRUST, et al.,

Defendant/Cross-Plaintiffs

v.

NILES BOLTON ASSOS., INC.,

Defendant/Cross-Defendant.

Civil Action No. AMD 04-3975.

March 18, 2009.

MEMORANDUM OPINION

ANDRE M. DAVIS, District Judge.

Plaintiffs (The Equal Rights Center ("ERC")), the American Association of People with Disabilities, and the United Spinal Association filed this action against Defendants Archstone Smith Trust and Archstone Operating Trust (together "Archstone"), Niles Bolton Associates, Inc. ("Niles Bolton"), Clark Realty Builders, VIKA, Inc., and Meeks + Partners (collectively "Defendants"), for violations of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3619, and the Ameri-

cans with Disabilities Act, 42 U.S.C. § 12181 ("ADA"). Plaintiffs alleged that more than 100 Archstone multi-family properties around the nation were non-compliant with those federal statutes insofar as the properties were designed, constructed, and maintained in a manner that failed to render them fully accessible to disabled and handicapped persons. Niles Bolton provided architectural services for 15 of these properties.

On June 9, 2005, this court issued a Consent Decree detailing a settlement agreement reached by Archstone with Plaintiffs. Plaintiffs eventually reached settlement agreements with all Defendants, including Niles Bolton, and additional Consent Decrees were approved and entered by the court.

The serial settlement agreements and resulting Consent Decrees have disposed of all claims and cross-claims save Archstone's state-law cross-claim against Niles Bolton. Discovery as to the cross-claim has concluded and now before the court are the following motions: (1) Archstone's motion to amend its cross claim; (2) the parties' cross-motions for summary judgment; and (3) Niles Bolton's motion to exclude Archstone's expert opinion testimony. All the motions have been fully briefed and a hearing was held on February 12, 2009. For the reasons set forth within, I shall deny the belated motion to amend the cross-claim. Furthermore, consonant with emergent legal principles, I am persuaded that Archstone's cross-claim for indemnity conflicts with federal law and must be dismissed with prejudice.

I.

Plaintiffs are nonprofit membership organizations that further the interests of persons with dis-

abilities. On December 20, 2004, they filed suit against Defendants alleging violations of the FHA and the ADA. Collectively, Defendants design, develop, construct, and operate apartment complexes throughout the country. The apartment complexes at issue are located in Maryland, Arizona, California, Colorado, Florida, Georgia, Illinois, Massachusetts, New Mexico, North Carolina, New Jersey, New York, Oregon, Tennessee, Texas, Virginia, Washington, and the District of Columbia. The remaining parties are Archstone, a real estate developer, and Niles Bolton, one of the architectural services design firms with which Archstone's predecessors contracted.

As mentioned above, in June 2005, Archstone and Plaintiffs entered into a settlement agreement, which was incorporated into a Consent Decree. The Consent Decree provided, *inter alia*, that Archstone would (1) pay to Plaintiffs $1.4 million in damages, attorney's fees, costs and other expenses and (2) survey and retrofit a total of 71 properties to bring them into compliance with the requirements of the FHA and the ADA. Fifteen of the 71 properties described in the Consent Decree were designed for Archstone's predecessor by Niles Bolton.

On July 1, 2005, Archstone filed a cross-claim for indemnity against Niles Bolton seeking to recover (1) the portion of the $1.4 million settlement payment to Plaintiffs attributable to Niles Bolton's designs; (2) the costs of retrofitting the Niles Bolton-designed properties encompassed by the Consent Decree; and (3) a portion of the attorney's fees Archstone has incurred in defending against Plaintiffs' claims and in seeking relief from Niles Bolton. Archstone's cross-claim relates to the following 15 properties: Governor's Green in Maryland; Reston Landing,

Springfield Station, Stoneridge, Woodland Park, and Worldgate in Virginia; Archstone Matthews, Olde Apex (a/k/a Cameron Woods) and Archstone Preston (a/k/a Cameron Chase) in North Carolina; Barrett Creek, Cameron Landing, State Bridge, and North Point in Georgia; Rocky Creek in Florida; and Hickory Hollow in Tennessee.

Archstone's cross-claim against Niles Bolton relies on the following legal theories, each set forth in a separate count: (1) contractual indemnity; (2) implied indemnity; (3) breach of contract; and (4) professional negligence. Each of these theories rests on the law of one of the following states: (1) the state in which a particular contract was formed; (2) the state selected by a contractual choice-of-law provision; (3) the state where the property is located; and/or (4) Georgia, where Niles Bolton is headquartered. Archstone elaborates that it is "seeking damages only for those violations [of the FHA] that occurred because NBA specified an incorrect dimension or other detail in its construction documents, or otherwise failed to provide sufficient information for the builder to construct the project in accordance with the applicable accessibility requirements." *See* Archstone's Mem. in Supp. of Mot. Summ. J. at 5 (brackets added).

In October 2008, after more than three years of litigation, Archstone moved to amend its cross-claim, *inter alia*, to assert a claim for contribution. Archstone also moved for summary judgment on the issue of Niles Bolton's liability for failure to design FHA-compliant housing, arguing that only damages issues should require trial.

Niles Bolton has filed a cross-motion for summary judgment on all counts. Niles Bolton principally argues that, as a matter of settled principles of

federal law, Archstone cannot seek, under state law, indemnification (or contribution), regardless of the state law legal theory employed. In the alternative, Niles Bolton argues that the state law claims are (1) barred by limitations; (2) barred because Archstone's settlement with Plaintiffs was an unreasonable but voluntary assumption of liability which it could have and would have avoided by defending itself in this action; (3) fatally undermined because, *inter alia*, Archstone has failed to project expert opinion evidence sufficient to sustain its burden to establish the applicable standard of care and any breach of professional duty. Finally, Niles Bolton argues that as a matter of law, it must prevail on the merits of the cross-claim. (Niles Bolton has filed a separate motion seeking to exclude Archstone's expert opinion testimony.)

In the view I take of the case, I need only reach the first issue presented by Niles Bolton's motion for summary judgment, preemption.

II.

Under Fed. R. Civ. P. 15(a)(2), "[t]he court should freely give leave [to amend pleadings] when justice so requires." The express language of the Rule reflects a tension between two important goals: (1) allowing easy amendment to reflect the changes in a party's position as the case develops, and (2) preventing prejudice to an opposing party who will have difficulty in determining how to present its case if a party is allowed to continuously change its position. The Fourth Circuit has construed Rule 15 liberally. *See, e.g., Harless v. CSX Hotels, Inc.*, 389 F.3d 444, 447 (4th Cir. 2004) ("The language of Federal Rule of Civil Procedure 15(a) has been construed to counsel a liberal reading of its application."). According to the

Fourth Circuit, "leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile." *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986) (*citing Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Here, Niles Bolton opposes Archstone's motion for leave to amend its cross-claim. Niles Bolton argues that allowing Archstone to amend the cross-claim to include a claim for contribution will be (1) prejudicial, as Niles Bolton would have to conduct further discovery; and (2) futile, because federal law precludes a right to contribution under the FHA and the ADA. I will consider these issues in turn.

Prejudice

Whether an amendment would be prejudicial is a factual determination. *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006). Courts look at the nature of the proposed amendment, the purpose of the amendment, and the time when the amendment was filed. *Id.* For example, a prejudicial amendment "raises a new legal theory that would require the gathering and analysis of facts not already considered by the opposing party [and is] offered shortly before or during trial." *Johnson*, 785 F.2d at 509 (citing *Roberts v. Arizona Board of Regents*, 661 F.2d 796, 798 (9th Cir. 1981); *Lyons v. Board of Ed. of Charleston*, 523 F.2d 340, 348 (8th Cir. 1975); *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 873 (6th Cir. 1973)). Courts disfavor belated claims that change the character of litigation. *Deasy v. Hill*, 833 F.2d 38, 42 (4th Cir. 1987) (affirming the denial of leave to amend a complaint on the eve of trial to include a claim for negligent performance of a pap smear

where the original complaint in a suit for medical malpractice alleged, in part, a negligent failure to disclose the results of the pap smear). On the other hand, an amendment that simply adds an additional theory of recovery based on the same set of alleged facts offered before discovery has begun is not prejudicial. *Laber*, 438 F.3d at 427.

Niles Bolton argues that if Archstone's motion were granted, it would be prejudiced because litigating a claim of contribution would require additional discovery. The court is constrained to endorse this contention. Niles Bolton correctly infers from the proposed claim for contribution that Archstone is essentially admitting liability for some of the violations at the Niles Bolton-designed properties Archstone developed and operates. This admission, according to Niles Bolton, would require further discovery into the nature of each and every alleged violation (under myriad states' laws) to which Archstone is impliedly conceding liability.

In other words, as the case had been framed in the more than three years before the motion to amend was filed, Niles Bolton was alleged, by virtue of the claim for indemnification, to be *solely liable* under the FHA and the ADA for *all* of the violations in the complexes it designed. *See Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1103 (4th Cir. 1989) (en banc) ("Indemnification, of course, involves shifting the entire loss from one wrongdoer to another; contribution requires each wrongdoer pay his proportionate-or *pro rata*-share of the adverse judgment.").

To permit an eleventh hour change in litigation theory to one of *partial liability* would mean that Niles Bolton has been prejudiced in its ability to as-

sess rationally its exposure to a damages award in favor of Archstone, as its litigation plan did not contemplate such an atomistic battlefield. Furthermore, Niles Bolton's settlement posture would of necessity have been quite different three years ago (before the expenditure of large sums for attorney's fees and litigation expenses) had it known that it was not facing a liability in excess of 15/71 of $1.5 million plus some share of the cost of retrofitting, but something considerably below that amount. (The numerator of the fraction is the total of Niles Bolton-designed properties and the denominator is the total number of properties requiring modifications identified in the Consent Decree stipulated by Plaintiffs and Archstone.)

Unquestionably, any reasonable litigant in Niles Bolton's position would have sought specific discovery into how Archstone believed it appropriate to allocate fault for the violations alleged by Plaintiffs, e.g., was Niles Bolton 25% at fault; 35%; 75%? Plainly, in the face of a claim solely for indemnification, no litigant would have been motivated to undertake such discovery, and Niles Bolton has not done so.

Indeed, Niles Bolton attempted in some ways to obtain certain discovery that, indisputably, would have been relevant to a contribution claim but not to an indemnity claim. Archstone resisted such discovery and both Magistrate Judge Gesner (who managed discovery) and I sustained Archstone's objections, each of us on the understanding that Archstone was pursuing *indemnity*. As Judge Gesner reasoned, in part, in granting a protective order to Archstone:

> First, several of the "issues" raised by [Niles Bolton] as to why the settlement doc-

> uments are relevant relate to how Archstone is allocating the $1.4 million settlement it paid to plaintiffs across the 71 properties subject to the settlement. Archstone responds that it is merely allocating 21% of that sum to [Niles Bolton] because [Niles Bolton] designed 15 of the 71 properties, (i.e., 21% of the total), and that [Archstone and Plaintiffs] did not agree on a damage figure for any particular property or for any particular type of violation.... Based upon this representation, the court cannot envision how the settlement documents will yield admissible evidence.

See Feb. 8, 2008, Order Granting Motion for Protective Order, p. 5 (Docket No. 145); *see also* this court's Order overruling Niles Bolton's objections to Judge Gesner's grant of the protective order:

> Niles [Bolton]'s emphasis that because Archstone's claim is one for *indemnity* arising out of a *settlement agreement* with plaintiffs the "reasonableness" of the settlement has primacy here is misguided, as Judge Gesner clearly recognized. Niles [Bolton] is not an insurer; the claim for indemnity under the circumstances here is much more akin to an original action for professional malfeasance. Manifestly, to succeed on its indemnity claim, Archstone will have to show the elements of such a claim; the details of settlement negotiations between the settling parties are of no consequence to the remaining, genuine issues in this case. Niles [Bolton's] keen interest in, indeed, its seeming obsession with, the settlement process, while un-

> derstandable, perhaps, is quite beside the point.

June 12, 2008, Order Overruling Objections to Order of Magistrate Judge, pp. 1-2 (Docket No. 160). As can be seen, there is no suggestion in these rulings that the court perceived there to be a contribution claim presented by Archstone.

Although no trial date had been assigned when the motion to amend was filed in October 2008, the close of the three-year discovery period was at hand and the due date for dispositive motions was looming large. While delay alone will not justify denial of a motion to amend, "[a] party who delays in seeking an amendment is acting contrary to the spirit of the rule." *Deasy*, 833 F.2d at 41 (internal quotation omitted).

Archstone argues that Niles Bolton's contention that it will be prejudiced by the amendment should be rejected because Niles Bolton had adequate notice of Archstone's intent to assert a claim for contribution. As support for this assertion, Archstone relies solely on the following allegation in Count IV (labeled "Negligence") of its cross-claim: "Niles Bolton is liable to Archstone for contribution of a portion of (i) the damages, attorney's fees and costs paid by Archstone to the Plaintiffs, and (ii) costs incurred by Archstone to modify and retrofit noncompliant portions of the Properties designed by Niles Bolton." Cross-claim, ¶ 29. I reject Archstone's contention that this lone statement in its cross-claim was sufficient to give reasonable notice to Niles Bolton of the existence of a claim for contribution.

First, the allegation is ambiguous. In claiming "contribution for a portion," Archstone has not ade-

quately advised Niles Bolton that the damages it seeks in the negligence count is any different from that sought in the other counts. (After all, the essence of the negligence claim is that Niles Bolton is guilty of *negligent breach of contract*.)

Moreover, in its prayer for relief, Archstone specifically failed to seek contribution, alleging, instead, that it sought "[j]udgment in favor of Archstone and against Niles Bolton for the cost of modifying those portions of the Properties designed by Niles Bolton;" and judgment "for the portion of the $1.4 million settlement paid by Archstone to Plaintiffs on account of the design deficiencies in the Properties designed by Niles Bolton;" and finally and most pointedly, "[a] declaration that Niles Bolton is required to indemnify Archstone for all costs that have been incurred or will be incurred by Archstone, in accordance with the Decree, to modify those portions of the Properties designed by Niles Bolton." In short, the cross-claim did not provide reasonable notice to Niles Bolton that not only indemnification, but also contribution, was being sought. *See id.* (disapproving of a party's "[h]inting at a claim"). Clearly, Archstone's decision to file the motion for leave to amend arose exactly because it realized, late in the litigation day, that it had not asserted a claim for contribution.

Accordingly, I find that the proposed amended cross-claim would work real and substantial prejudice to Niles Bolton. In light of the well-settled law surrounding the obvious differences between indemnity, on the one hand, and contribution, on the other hand, *see Baker, Watts & Co.*, 876 F.2d at 1103; *and see* cases discussed *infra*, Archstone's failure to identify a claim for contribution for more than three years of vigorous litigation and contentious discovery

is not excusable. The delay, coupled with the evident prejudice the proposed amendment would visit on Niles Bolton, compels denial of the motion to amend.

Futility

Niles Bolton also contends that the belated addition of a contribution claim would be futile because federal law forecloses a claim for contribution in respect to joint and several liability arising under the FHA and the ADA, with the same force as it precludes a claim for indemnity. As discussed below, I agree that no right to indemnification exists under the FHA or the ADA, and there is no reason to suppose an analysis of a claim for contribution under the circumstances here would yield any different result.

For the reasons explained above, therefore, the motion to amend shall be granted, insofar as Archstone seeks to delete two of the properties it originally identified as Niles Bolton-designed properties, but it shall be denied insofar as Archstone seeks to assert a claim based on the theory of contribution.

III.

Cross motions for summary judgment "do not automatically empower the court to dispense with the determination whether questions of material fact exist." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 349 (7th Cir. 1983), *cert. denied*, 464 U.S. 805 (1983). "Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). The court may grant summary judgment in

favor of one party or deny both motions. *See Shook v. United States*, 713 F.2d 662, 665 (11th Cir. 1983).

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is genuine if, considering all evidence, no reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it may affect the outcome of the case. *Id.* "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met this initial burden, the non-moving party must set out specific facts showing a genuine issue for trial to avoid summary judgment. Fed. R. Civ. P. 56(e)(2).

IV.

A

Plaintiffs brought first-party claims against Defendants under the FHA and the ADA. Archstone's subsequent cross-claim against Niles Bolton is a derivative claim for indemnity. *See Hepburn v. Athelas Inst., Inc.*, 324 F. Supp. 2d 752, 757 n. 1 (D. Md. 2004) (indemnification and contribution are derivative claims). Thus, it is undisputed that, although Archstone has clothed its claims for relief in the state law garb of breach of contract and professional mal-

practice, all are derivative claims in the sense that they arise *solely* based on Archstone's actual or potential first-party liability under, i.e., its violation of, the FHA and/or the ADA.

It is well-settled, as a matter of federal jurisprudence, that a right of indemnity and/or contribution may be created (1) by Congress, either explicitly or by judicial implication from discovered Congressional intent, or (2) by the Supreme Court in the exercise of its remedial power to fashion a limited federal common law. *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 90 (1981) (holding that contribution claims were not available to an employer liable, jointly with a labor union, for violations of Title VII of the Civil Rights Act of 1964 and/or the Age Discrimination in Employment Act of 1967). The clear weight of authority among lower courts applying the reasoning of *Northwest Airlines* compels the conclusion that there is no right to indemnification under the FHA or the ADA.

First, no such expressed right exists under those statutes. As for the possibility of an implied right based on one or both of the statutes, the Supreme Court has instructed: "In determining whether a federal statute that does not expressly provide for a particular private right of action nonetheless implicitly created that right, our task is one of statutory construction.... The ultimate question in [such] cases ... is whether Congress intended to create the private remedy-for example, a right to contribution-that the plaintiff seeks to invoke." *Id.* at 91. Congressional intent may be inferred from the following factors: the language of the statute itself, the statute's legislative history, the purpose and structure of the statute, and the likelihood that Congress intended to supersede or

to supplement existing state remedies. *Id.* (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

Second, although, in limited circumstances, federal courts have the power to fashion "federal common law," *Northwest Airlines*, 451 U.S. at 95, the Supreme Court has cautioned that "federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Id.* The legislative, not the judicial branch, is vested with lawmaking powers. *Id.* "Thus, once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law." *Id.* at 95 n. 34.

The limited circumstances in which federal courts have the power to fashion federal common law are "few and restricted," as the Supreme Court pointed out in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981):

> There is, of course, "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Nevertheless, the Court has recognized the need and authority in some limited areas to formulate what has come to be known as "federal common law." *See United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947). These instances are "few and restricted," *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963), and fall into essentially two categories: those in which a federal rule of decision is "necessary to protect uniquely federal interests," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964),

> and those in which Congress has given the courts the power to develop substantive law, *Wheeldin v. Wheeler*, *supra*, at 652.

In sum, the unmistakable thrust of Supreme Court precedent is that Congress' selection (and non-selection) of remedies in comprehensive remedial federal statutes, especially anti-discrimination statutes, is not a proper subject with which federal or state courts ought to tinker. *See infra*.

B

Faithful to this mandate, every federal court to have examined the teachings of *Northwest Airlines* and its progeny (including *Texas Industries*, which was decided the same term as *Northwest Airlines*) in the context of the FHA and the ADA has concluded that no claim to indemnity (or contribution) exists in connection with liabilities arising thereunder. *United States v. Quality Built Const., Inc.*, 309 F. Supp. 2d 767 (E.D.N.C.2003), for example, applied the reasoning of *Northwest Airlines* in a case in which the government filed an action against a developer, a builder and an architect for failing to design and build FHA-compliant complexes. *Id.* at 771. The government and the architect resolved the suit by entering into a consent order. *Id.* The builder filed a cross-claim against the architect for indemnification and contribution. *Id.* at 778. The builder also asserted state law claims for breach of contract and breach of the standard of care. *Id.* The architect moved for summary judgment, contending (1) there is no express or implied right to indemnity or contribution under the FHA, (2) there is no federal common law right to indemnification or contribution, and (3) the state law claims for breach of contract and breach of

the standard of care, as *de facto* claims for indemnification and contribution, failed as a matter of law. *Id.*

The court conducted an evaluation of the cross-claim pursuant to the principles laid down in *Northwest Airlines, Id.* at 778-79. The court granted summary judgment to the architect on the claims for indemnification and contribution, as well as on the state law claims "[t]o the extent that Defendants seek indemnification," *Id.* at 779 (*citing Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1108 (4th Cir. 1989), and *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 665 (D. Md. 1998)), concluding that federal law afforded no claim to relief. The court declined to exercise supplemental jurisdiction over the remaining state law claims and they were dismissed without prejudice. *Id.*

United States v. Gambone Brothers Dev. Co., 2008 WL 4410093 (E.D. Pa. Sept. 25, 2008), a case in which "the relevant facts [were] indistinguishable from [those in *Quality Built Const.*]," *id.* at *4 (alterations added), adopted and elaborated the reasoning in Quality Built Const. and reached the same result. *Accord United States v. Shanrie Co., Inc.*, 2009 WL 455136 (S.D. Ill. Feb. 23, 2009); *see also Bowers v. Nat'l Collegiate Athletic Assoc.*, 346 F.3d 402 (3rd Cir. 2003) (no contribution claim under Title II of the ADA); *Access 4 All, Inc. v. Trump Int'l Hotel & Tower Co.*, 2007 WL 633951, *6 n. 8, 2007 U.S. Dist. LEXIS 13560, *20 n. 8 (S.D.N.Y. Feb. 26, 2007) ("There is no express right to indemnity under the ADA, and the fact that the ADA has a comprehensive remedial scheme and that owners of non-compliant properties are not members of the class that the statute was in-

tended to protect argue against reading any implied right of indemnification into the statute.").

C

Archstone plainly recognizes that federal law affords it no remedy under the circumstances of this case; it makes no argument to the contrary. Rather, as I understand its contentions, it argues that it is entitled to indemnity under *state law*. Archstone's theories can be distilled to two propositions. First, because Niles Bolton had, not simply a statutory duty owed to Plaintiffs, but separate and distinct contractual and professional duties owed to Archstone to ensure its designs complied with the FHA and the ADA, then in the face of a proven breach of those duties, Archstone should have a remedy under state law for (negligent) breach of contract. Second, because most, if not all, of the separate contracts between Archstone and Niles Bolton expressly provide for indemnification for damages arising out of Niles Bolton's failure to perform its agreements, indemnity is therefore available. These contentions are unavailing.

To be sure, Archstone is correct in its assertion that Niles Bolton had an independent obligation to design FHA- and ADA-compliant multi-unit housing. Archstone devotes more than 20 pages in its memorandum in support of the motion for partial summary judgment explaining that Niles Bolton (1) was required to comply with the FHA and ADA, and (2) (allegedly) failed to comply with the requirements of those statutes. As to the former assertion, it is true that Niles Bolton, like Archstone, had a nondelegable duty to design compliant dwellings. Furthermore, as to the latter assertion, Niles Bolton's failure to fulfill its independent obligation under the

federal statutes opens itself up to liability. Manifestly, however, Niles Bolton is, or would be, liable only to Plaintiffs on first-party claims under the FHA and the ADA, claims Plaintiffs properly asserted. *See Baltimore Neighborhoods, Inc.*, 3 F. Supp. 2d at 665 ("In essence, any entity who contributes to a violation of the FHAA would be liable. By this, the Court does not suggest that all participants are jointly and severally liable for the wrongful actions of others regardless of their participation in the wrongdoing, but rather, that those who are wrongful participants are subject to liability for violating the FHAA"). Most assuredly, Niles Bolton is not and would not be liable to Archstone on a derivative indemnification claim based on the FHA or the ADA.

As a matter of law, Archstone's state law claims for breach of contract and professional negligence are wholly derivative of Archstone's primary liability and are therefore what federal law regards as *de facto* claims for indemnification. Accordingly, those state law claims are barred because any recovery by Archstone would frustrate the achievement of Congress' purposes in the FHA and the ADA. To paraphrase the Fourth Circuit: "[A] state action for indemnification would frustrate the basic enforcement of federal [anti-discrimination] law. Plaintiff's [state law statutory] claim for indemnification is therefore preempted and should be dismissed with prejudice. We leave it to the state courts to classify plaintiff's pendent common law actions. If they are *de facto* claims for indemnification, they too are preempted." *Baker, Watts & Co.*, 876 F.2d at 1108 (alterations added); *see Quality Built Const.*, 309 F. Supp. 2d at 779 ("To the extent that Defendants seek indemnification on the basis of these state actions, the claims are not allowed").

In *Baker, Watts & Co.*, on which Archstone heavily relies, the Fourth Circuit did not preclude state law remedies for *contribution* based on a Maryland statute that afforded relief to injured investors bringing first-party claims largely on the same basis as federal securities laws, although the federal claims had been finally adjudicated and complete relief awarded thereunder. *See Baker, Watts & Co.*, 876 F.2d at 1106. The Court reasoned that the plaintiff in that case, which had paid damages in settlement of the first-party claims, may seek contribution based on the state statute (or, perhaps, state common law) unless its claims are preempted by federal law. *Id.* "State law is preempted only when Congress acts to 'occupy the field,' or when the state claims at issue actually conflict with federal law." *Id.* at 1107. As the state securities statute permissibly coexisted with the federal statute, no conflict between the two precluded a claim for contribution based on the state statute, *although indemnification was foreclosed. Id.*

Here, Archstone's sole claim is for indemnification, even those labeled as breach of contract and professional malpractice, and indemnification is antithetical to Congress' purpose in enacting the FHA and the ADA. However labeled, the indemnification claim is preempted by federal law, every bit as much as such a claim is preempted in respect to the federal securities laws under review in *Baker, Watts & Co.* Archstone claims that it "is not seeking, through its implied indemnity claims, to 'shift its entire responsibility for federal violations to Niles Bolton.'" *See* Archstone's Reply Mem. at 29. But by its very definition, that is exactly what indemnity means.

Archstone points to its contracts with Niles Bolton as a basis for indemnification. These contracts

contain express indemnity provisions for losses and damages arising out of Niles Bolton's performance of, or failure to perform, its duties and obligations under the contract. But I must reject this formalism. The Plaintiffs alleged first-party FHA and ADA claims and Archstone's derivative claim for indemnity must first be evaluated under those statutes if the Congressional purposes are to be fully achieved. As the caselaw cited above well shows, both statutes are comprehensive. To illustrate, among the purposes of the ADA are "(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities [and] (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(a)(1)-(a)(2). These goals would be undermined if parties could simply "contract around" their responsibilities under the statute. *Cf. Access 4 All, Inc. v. Atlantic Hotel Condominiums Ass'n, Inc.*, 2005 WL 5643878, *13 (S.D. Fla. Nov. 23, 2005) ("[T]he Court cannot approve an arrangement where a developer of a hotel can essentially contract around ADA compliance").

The same imperative of Congressional purpose applies to attempts to "contract around" the "nondelegable" duties imposed by the FHA. The *Gambone* court succinctly summarized why Congress' comprehensive plan to root out disability discrimination in housing in the FHA, as amended, would be seriously undermined if those with primary liability under the FHA could shift the burdens and costs of compliance to others:

> [The court] agree[s] with the holding of *Quality Built* that a defendant that is itself liable under the FHA for handicap discrimi-

> nation is "clearly not among the class which the statute is intended to protect, but rather [is] the part[y] whose conduct the statute was intended to regulate." *Quality Built*, 309 F. Supp. 2d at 778. In passing the statute, Congress created the same type of "comprehensive legislative scheme including an integrated system of procedures for enforcement" that was at issue in *Texas Indus.* and *Northwest* Airlines. Consequently, "the presumption that a remedy was deliberately omitted from a statute is strongest." *Texas Indus.*, 451 U.S. at 645 (quoting *Northwest Airlines*, 451 U.S. at 97). *Congress failed to provide a contribution and indemnity remedy to permit one defendant from asserting joint and several liability against co-defendants. This failure raises the presumption that Congress deliberately intended that each co-defendant have a non-indemnifiable, non-delegable duty to comply with the FHA and to compensate others for its own conduct.*

Gambone Brothers Dev. Co., 2008 WL 4410093, *8 (first two alterations added; emphasis added). Thus, Archstone's express indemnity claim, based on its contract with Niles Bolton, is barred by federal law, every bit as much as its implied indemnity claim is barred.

Notably, the Fourth Circuit has made clear that it "reject[s][the] assertion that the federal policy against indemnification extends only to intentional wrongdoing." *Baker, Watts & Co.*, 876 F.2d at 1108 (alterations added). The robustness of that "federal policy" is such that under the circumstances here, indemnification is forbidden irrespective of the

source of the cross-plaintiff's claimed entitlement to it. *Id.*

V.

For the reasons set forth, Archstone's motion to amend shall be denied as untimely and prejudicial to Niles Bolton. Furthermore, the conclusion is inescapable that Archstone's cross-claim for indemnity is barred by federal law. Accordingly, Niles Bolton's motion for summary judgment shall be granted and Archstone's cross-claim dismissed with prejudice. An Order follows.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

EQUAL RIGHTS CENTER, et al.,

Plaintiffs

ARCHSTONE SMITH TRUST, et al.,

Defendant / Cross-Plaintiffs

v.

NILES BOLTON ASSOS., INC.,

Defendant / Cross-Defendant

Civil Action No. AMD 04-3975

ORDER

In accordance with the foregoing Memorandum Opinion, it is this 18th day of March, 2009, by the United States District Court for the District of Maryland, ORDERED

(1) That the motions to exclude, for partial summary judgment, to strike, and to take judicial notice (Paper Nos. 183, 185, 192, 204, and 221) are DENIED; and it is further ORDERED

(2) That the motion to amend (Paper No. 182) is GRANTED IN PART AND DENIED IN PART; and it is further ORDERED

(3) That the motion for summary judgment (Paper No. 193) is GRANTED AND JUDGMENT IS ENTERED IN FAVOR OF NILES BOLTON ASSO-

CIATES, INC., against ALL CROSS-PLAINTIFFS; and it is further ORDERED

(4) That ALL PRIOR RULINGS MADE HEREIN ARE RECONFIRMED, ALL REMAINING CLAIMS, COUNTERCLAIMS AND CROSS-CLAIMS ARE DISMISSED, AND THIS ORDER CONSTITUTES A FINAL JUDGMENT; and it is further ORDERED

(5) That the Clerk shall CLOSE THIS CASE.

/s/
ANDRE M. DAVIS
United States District Judge

APPENDIX D

Relevant Provisions of the Fair Housing Act of 1968 (FHA), 42 U.S.C. §§ 3601 et seq.

42 U.S.C. § 3601. Declaration of Policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

42 U.S.C. § 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial sta-

tus, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f)

(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of--

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes—

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that—

(i) the public use and common use portions of such dwellings are readily ac-

cessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).

(5)

(A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C),

compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

(B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

(D) Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

(6)

(A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section

3610(f)(3) of this title to receive and process complaints or otherwise engage in enforcement activities under this subchapter.

(B) Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this subchapter.

(7) As used in this subsection, the term "covered multifamily dwellings" means—

(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

(B) ground floor units in other buildings consisting of 4 or more units.

(8) Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this subchapter shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subchapter.

(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

APPENDIX E

Relevant Provisions of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 et seq.

42 U.S.C. § 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex,

national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(9) Redesignated (8)

(b) Purpose It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12182. Prohibition of discrimination by public accommodations

(a) General rule No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction

(1) General prohibition

(A) Activities

(i) Denial of participation It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that

provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) Opportunity to participate Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) Administrative methods An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration—

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) Association It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) Specific prohibitions

(A) Discrimination For purposes of subsection (a) of this section, discrimination includes—

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or ac-

commodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, fa-

cilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

(B) Fixed route system

(i) **Accessibility** It shall be considered discrimination for a private entity which operates a fixed route system and which is not subject to section 12184 of this title to purchase or lease a vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on such system, for which a solicitation is made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(ii) **Equivalent service** If a private entity which operates a fixed route system and which is not subject to section 12184 of this title purchases or leases a vehicle with a seating capacity of 16 passengers or less (including the driver) for use on such system after the effective date of this subparagraph that is not readily accessible to or usable by individuals with disabilities, it shall be considered discrimination for such entity to fail to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent

to the level of service provided to individuals without disabilities.

(C) Demand responsive system For purposes of subsection (a) of this section, discrimination includes—

(i) a failure of a private entity which operates a demand responsive system and which is not subject to section 12184 of this title to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities; and

(ii) the purchase or lease by such entity for use on such system of a vehicle with a seating capacity in excess of 16 passengers (including the driver), for which solicitations are made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs) unless such entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to that provided to individuals without disabilities.

(D) Over-the-road buses

(i) Limitation on applicability Subparagraphs (B) and (C) do not apply to over-the-road buses.

(ii) Accessibility requirements For purposes of subsection (a) of this section, discrimination includes (I) the purchase or lease of an over-the-road bus which does not comply with the regulations issued under section 12186(a)(2) of this title by a private entity which provides transportation of individuals and which is not primarily engaged in the business of transporting people, and (II) any other failure of such entity to comply with such regulations.

(3) Specific construction Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

42 U.S.C. § 12183. New construction and alterations in public accommodations and commercial facilities

(a) **Application of term** Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes—

(1) a failure to design and construct facilities for first occupancy later than 30 months after

July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter; and

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) Elevator Subsection (a) of this section shall not be construed to require the installation of an

elevator for facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

APPENDIX F

28 C.F.R. § 36.201 General.

(a) **Prohibition of discrimination.** No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any private entity who owns, leases (or leases to), or operates a place of public accommodation.

(b) **Landlord and tenant responsibilities.** Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are public accommodations subject to the requirements of this part. As between the parties, allocation of responsibility for complying with the obligations of this part may be determined by lease or other contract.